

**The Supreme Court of Israel sitting as the Final Court of Criminal Appeals**

Criminal Appeal 2921/18

Criminal Appeal 2961/18

Before:

The Honorable Justice N. Sohlberg

The Honorable Justice G. Karra

The Honorable Justice A. Stein

Appellant in criminal appeal 2921/18

Respondent in criminal appeal 2961/18:

The State of Israel

VS.

Respondent 3 in criminal appeal 2921/18

Appellant in criminal appeal 2961/18:

Aviv Bezalel

Appeals from the District Court of Tel Aviv-Jaffa (Sagi, J.), criminal case 16281-08-16  
28/12/2017

Hearing date:

31/12/2018 (23 Tevet 5779)

For the Appellant in criminal appeal 2921/18

For the Respondent in criminal appeal 2961/18:

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For Respondent in criminal appeal 2921/18

For the Appellant in criminal appeal 2961/18:

Idit Ken Tzipor

**Justice A. Stein**

**“Prisoners in the Yard”: Statistical and Individual Evidence**

1. For many years, scholars of evidence law have discussed the Prisoners in the Yard hypothetical:

In a 1000-inmate prison, 999 inmates conduct a riot during which they kill all of the corrections officers, with the exception of two officers who escape by helicopter and film the riot from the aircraft. The film shows an unidentifiable inmate breaking away from the rioters: He stands against the wall with his hands raised, does not engage in any violent acts, and does not assist the other inmates in any way.

See Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192–93 (1979).

These discussions examine the rationale behind the legal requirement that a defendant’s guilt be shown using individualized evidence, which points at him personally, rather than using statistical evidence alone. Those who oppose statistical evidence argue that it cannot prove beyond a reasonable doubt that the actual, accused defendant committed the crime attributed to him. In the Prisoners in the Yard hypothetical, every inmate has a statistical probability of 0.999 (or 99.9%) of having taken part in the riot. Scholars argue that this probability cannot establish the guilt of any individual inmate because it does not prove that the individual took illegal actions and does not disprove the possibility that the individual is the one who refused to participate in the riot. See Alex Stein, FOUNDATIONS OF EVIDENCE LAW 78–85, 148–49 (“FOUNDATIONS”); Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 79–571 (2013); Liat Levanon, *Statistical Evidence, Assertions and Responsibility*, 82 MODERN L. REV. 269 (2019). Thus, the guilt of a criminal defendant can only be established by individualized evidence that proves his own actions, and not by general characteristics that associate him with a statistical group. Evidence proving the defendant’s guilt can, of course, combine general statistical

data with individualized evidence—as D.N.A. and other “second generation” forensic evidence do—but statistical data alone cannot prove a criminal defendant’s guilt. *See* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 738 (2007) (“Advances in second-generation sciences do not just encourage the substitution of cases with a forensic evidence component for those without such a component. They also allow for the identification of perpetrators even in the absence of any other evidence.”). However, statistical data alone is insufficient to support a criminal conviction. Both Anglo-American evidence law and Israeli evidence law require individualized evidence for criminal convictions. *See* FOUNDATIONS 172–78; CrimA 6359/99 State of Israel v. Korman 54(4) PD 653, 662 (2000).

Supporters of statistical evidence argue that all evidence is fundamentally statistical, since all evidence contains uncertainty. Therefore, legal systems must simply determine the probability threshold that inculpatory evidence must clear in order to convict a defendant. *See* FOUNDATIONS 148–49. Societal values determine this probability threshold. The threshold is derived mathematically from the largest number of guilty defendants that a society is willing to acquit ( $n$ ) in order to prevent the conviction and punishment of a single innocent defendant. *See* John Kaplan, *Decision Theory and the Fact-Finding Process*, 20 STAN. L. REV. 1065, 1071–75 (1968). From this perspective, the probability threshold that evidence must clear in order to convict a defendant is  $\frac{n}{n+1}$ . *See* FOUNDATIONS 172–73. For example, in the Prisoners in the Yard hypothetical, if we decide, in line with Maimonides, that  $n=1,000$ , we must acquit every prisoner, since the probability threshold is slightly above 0.999. *See* MAIMONIDES, SEFER HAMITZVOT LEHARAMBAM, LO TA’ASEH § 290 (“It is preferable to acquit one thousand sinners than to kill one innocent person.”). On the other end of the spectrum, represented by Vladimir I. Lenin, one of the founders of

Communism,  $n$  is equal to 1, if not less. See MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 121 n.41 (1996). According to this metric, which fortunately our society rejects, when the probability of guilt reaches a mere 0.5, the court must convict and punish the defendant. A society, of course, can adopt a value of  $n$  between Maimonides' value and Lenin's, and set  $n$  at much higher than 1 but significantly lower than 1,000. See Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997). For example, William Blackstone, an influential legal thinker whose writings surveyed eighteenth century English common law, valued  $n$  at 10. According to this metric, called the Blackstone Ratio, the court must convict a defendant if the probability of guilt is greater than 0.91. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*358 (Gallaghan & Co. 1872).

2. The appeals before us present us with the Prisoners in the Yard hypothetical and its opposite scenario, as I will show below.

### **The Appeals**

3. Before us lies an appeal from the judgment of the Tel Aviv-Jaffa District Court (B. Sagi, J.) in criminal case 16281-08-16 on 28/12/2017 (“the district court ruling”). The district court ruling acquitted Mr. Aviv Bezalel (“the appellant”) of infliction of grievous bodily harm, Penal Code, 5737-1977, § 329(a)(1), and convicted him of conspiracy to commit a felony, *id.* § 499(a)(1). The district court sentenced the appellant to the time spent behind bars while detained without bail and to probation, restrained him from the vicinity of soccer stadiums, and fined him.

4. The appellant appeals his conviction of conspiracy to commit the felony of infliction of grievous bodily harm, arguing that he should have been convicted instead of conspiracy to commit the misdemeanor of breaking and entering with intent to steal. *Id.* § 499(a)(2). The State, on the other hand, asks us to overturn the appellant's acquittal of infliction of grievous bodily harm. The

State claims that the appellant was not only a member of the conspiracy to commit the felony of assaulting fans of the Hapoel Tel Aviv Football Club, but also that he furthered the felony and possessed criminal intent. For these reasons, the State asks us to convict the appellant, overturning the district court's decision to acquit him.

### **General Background and the Indictment**

5. The appellant is a member of the La Familia fan group of the Beitar Jerusalem Football Club. This group's criminal activity has been discussed in our prior opinions. *See* CrimA 2854/18 Moshe v. State of Israel (Aug. 27, 2019); CrimA 2814/18 Manor v. State of Israel (Feb. 27, 2019); CrimA 3754/18 Nahshon v. State of Israel (Apr. 8, 2019).

6. On 8/11/2016, the State filed an amended indictment of various members of La Familia with the district court. The indictment included five charges, only one of which was brought against the appellant. This charge relates to a violent incident that occurred on 3/10/2015 in the Florentin neighborhood of Tel Aviv ("the event" or "Florentin 1"). The relevant facts of Florentin 1 are as follows:

Around early October 2015, a fight broke out between Omer Golan, a member of La Familia, and Jack, a fan of Hapoel Tel Aviv. As a result, Golan decided to kill the fan of Hapoel Tel Aviv. On 3/10/2015, a number of La Familia members conspired to lie in wait for Hapoel Tel Aviv fans and assault them using cold weapons. To further the conspiracy, these members coordinated through telephone calls and WhatsApp messages to meet at "Falafel Gina," a food establishment located near Bloomfield Stadium in Jaffa. The La Familia members arrived there at approximately 7:30 PM, the majority of them masking their faces, wearing dark clothes, and carrying baseball bats, wood batons, stones, knives, glass bottles, screwdrivers and rubber pipes. Omer Golan carried a claw hammer with sharpened claws ("the hammer") and declared in front

of several members that he intended to kill Jack “today.” Golan secreted the hammer under one of the vehicles in the area. At some point the La Familia members began to trail fans of Hapoel Tel Aviv. At approximately 8:30 PM, they set up position near the Hapoel fans’ storage unit on Florentin Street (Elifelet Parking Garage). When they noticed a group of approximately twenty Hapoel fans, they chased them down and assaulted them using weapons and chairs, kicking and punching them. During this assault, one of the La Familia members struck a Hapoel fan, Y.S. (“the complainant”), in the head with a brick. Golan ran off to retrieve the hammer, returned with it, and drove its sharp end into the complainant’s head. The La Familia members continued assaulting the complainant while he was stretched out on the ground and bleeding, with the hammer still in his head. Subsequently, the complainant underwent multiple complex surgeries that saved his life. After these procedures, the complainant was found by the National Insurance Institute of Israel to be disabled at 83% and was granted permanent disability at 100%.

### **The District Court Opinion**

7. The district court made several findings of fact based on the evidence before it. It found that on 3/10/2015, dozens of La Familia members traveled to Florentin, where they conspired to lie in wait for Hapoel Tel Aviv fans—who were expected to arrive and place equipment in the storage unit—and attack them. The court also found that these members carried various cold weapons, waited for the arrival of Hapoel Tel Aviv fans, and attacked them from 8:25 PM to 8:32 PM, at which point the attackers fled the scene.

8. The court also found that the conspiracy was initiated over the La Familia WhatsApp group, where instructions regarding the meeting point were disseminated. The conspiracy was instantiated by the La Familia members carrying weapons, wearing dark clothing that hindered their identification, and lying in wait for Hapoel fans. The court emphasized that carrying weapons

and waiting in Elifelet Parking Garage for Hapoel fans to arrive were the “heart of the conspiracy” and “unequivocal.”

9. Taking note of these facts, the court limited the issues to the following question: Might the appellant’s version of events, that he arrived at the gathering and left as soon as he realized it would turn violent, without participating in the violent acts, be true?

10. In order to answer this question, the court examined the following evidence proffered by the prosecution: First, the goals and methods of La Familia; Second, the appellant’s arrival at the area with other La Familia members; Third, L’s testimony (L is a La Familia member operating as a police informant) (“the State’s witness”), which indicates that the appellant participated in the event; Fourth, co-conspirator witness Omer Golan’s statement to the State’s witness that “if I’m not mistaken, Aviv was . . . Aviv Bezalel if I’m not mistaken”; Fifth, the statement of co-conspirator witness Naor Shmuel, who nodded affirmatively when asked by the State’s witness whether the appellant and Ron Ayash (a La Familia member who accompanied the appellant) were at the event; Sixth, the statement of co-conspirator witness Matan Shimon placing the appellant at the event, stating he was one of the last people to leave the scene, and calling him “Kravitz,” from the word “kravi” (“combat soldier” in Hebrew –trans.).

11. The court also examined the following arguments and evidence presented by the defense: First, the fact that when co-conspirator witness Ofek Cohen listed the people at the event, he did not name the appellant; Second, the fact that Ofek Cohen denied knowing the appellant from other violent events; Third, the statement of co-conspirator witness Matan Shimon that “there was [sic] two from Kiryat Malachi who I know weren’t involved” combined with the fact that the appellant and Ron Ayash came from the town of Kiryat Malachi; Fourth, cellular location data placing the appellant at 8:54 PM at Ashdod Junction [away from Tel Aviv] which is more consistent with the

appellant's story of leaving early than with Matan Shimon's story of leaving late; Fifth, the testimony of the defense witness Ron Ayash, who confirmed the appellant's version of events, including the claim that they left Florentin a short time before the violent event began; Sixth, cellular location data placing Ron Ayash at the site of the event at 8:36 PM (HaRabi MiBachrach Street) and five minutes later, at 8:41 PM, at Dov Hoz in Holon [a Tel Aviv suburb], which supports the appellant's version of events.

12. The district court also considered the appellant's testimony, stating it was "far from impressive," and noting that like the testimony of other La Familia members, it was characterized by a desire to "protect other [La Familia] members." The court did not believe the appellant's statement that he thought the members gathered at the area in order to steal equipment from the Hapoel Tel Aviv fans' storage unit. The court concluded that the appellant's statement was unreliable in part because he denied witnessing members arm themselves, whereas the prosecution proved that he had witnessed this.

13. On the basis of this evidence, the district court concluded that the appellant "arrived at the Elifelet Parking Garage in Florentin, where he met the other organization members and participated in the arming that took place at the location of the event. He therefore took part in the conspiracy to assault Hapoel Tel Aviv fans and cause grievous bodily harm." The court emphasized that it was not obligated to accept the appellant's argument that his criminal responsibility included only conspiracy to break and enter into the Hapoel storage unit. The court held that the appellant was a member of La Familia who conspired to violently attack Hapoel Tel Aviv fans near their storage unit. Nonetheless, the court found that the evidence, on balance, created a reasonable doubt regarding the appellant's participation in the actual assault. The court

therefore convicted the appellant of conspiracy to commit a felony and acquitted him, due to reasonable doubt, of infliction of grievous bodily harm. Both parties appealed.

### **The Parties' Arguments**

14. The appellant argues that the district court erred in convicting him of conspiracy to commit infliction of grievous bodily harm instead of conspiracy to break and enter with intent to steal. He argues that the prosecution's evidence fails to prove beyond a reasonable doubt that he knew that the La Familia members were planning to attack Hapoel Tel Aviv fans and cause them grievous bodily harm. He argues that justice requires that we accept his version of events, which he claims is supported by the evidence, that he thought the plan was to break into the Hapoel storage unit and steal equipment. The appellant asks us to overturn his conviction of felony conspiracy and replace it with a conviction of misdemeanor conspiracy.

15. The State argues that the appellant's conviction of felony conspiracy is well-founded and appeals the appellant's acquittal of infliction of grievous bodily harm. In its appeal, the State argues that the district court erred in its analysis of the evidence and drew the wrong conclusions from the cellular location data. The State also argues that the location data disproves the appellant's version of events and proves beyond a reasonable doubt that he participated in the event. For these reasons, the State asks us to deny the appellant's appeal, grant its appeal, convict the appellant of infliction of grievous bodily harm, and increase his sentence.

### **Analysis and Disposition**

#### **Felony Conspiracy**

16. I am unconvinced by the appellant's arguments for overruling his conviction of conspiracy to commit infliction of grievous bodily harm. This court does not interfere with trial court findings of fact, since the trial court forms direct impression from testifying witnesses and observes the full

evidentiary picture. *See* CrimA 1193/16 Songo v. State of Israel ¶ 9 (Oct. 19, 2017); CrimA 2035/16 Doe v. State of Israel ¶ 15 (Sept. 14, 2017). We limit interference to extraordinary cases in which there is a clear need to correct a fundamental error in order to prevent a miscarriage of justice. *See* CrimA 6773/17 Zelig v. State of Israel ¶ 12 (Apr. 3, 2019); CrimA 8027/13 Doe v. State of Israel ¶ 28 (May 27, 2018); CrimA 9352/99 Yomtovian v. State of Israel 54(4) PD 632, 643–45 (2000). This is not such a case.

17. As dictum, I acknowledge that the evidence before the trial court unquestionably proves the appellant’s guilt of felony conspiracy beyond a reasonable doubt. The evidence establishes the following facts: First, the appellant was a member of La Familia and was familiar with its operations; Second, the appellant arrived at the vicinity of the Hapoel storage unit at the same time as other La Familia members; Third, many of these members brought weapons and dressed in a manner intended to hide their identities; Fourth, the time of their arrival matched the estimated arrival time of Hapoel Tel Aviv fans—at the end of the Hapoel Tel Aviv vs. Hapoel Kfar Saba match. This final piece of evidence alone is sufficient to disprove the appellant’s theft thesis: thieves do not plan encounters with owners of the property they intend to steal, nor do they time their burglaries to coincide with the arrival of the victim property owners.

18. The Hapoel storage unit in Florentin is no parallel to the clock in the Grand Central train station of Manhattan, which became a focal point for unplanned meetings. *See* THOMAS S. SCHELLING, *THE STRATEGY OF CONFLICT* 55 (1960). It is clear that La Familia members, who have no relationship of ownership or fondness with the storage unit of its rival team’s fans, did not arrive by happenstance at that time and place, with veiled faces, wearing dark clothing and carrying baseball bats, wood batons, rocks, knives, glass bottles, screwdrivers, and rubber pipes. This was evidently a planned event, and the mere fact of the appellant’s arrival under these circumstances

proves beyond a reasonable doubt that he was part of the criminal conspiracy to attack the Hapoel Tel Aviv fans and cause some, if not all of them, grievous bodily harm. *See* CrimA 8416/09 State of Israel v. Harbush ¶¶ 50–51 (June 9, 2010). Authentic eyewitness descriptions of the event leave no doubt regarding what transpired during the event. *See, e.g.*, Protocol of 30/1/2017 p. 33 line 5 (response of defendant Dor Meggidish to the indictment: “from the moment he saw iron pipes being distributed to certain people, he understood where this was headed”); T/21, lines 8–10 (statement of eyewitness Tali Malka that she saw a group of at least ten people, “all of them wearing black clothes and hats, chasing a small group of people, and carrying construction boards and rocks”). This is an image of war—a war that leaves its victims with grievous injuries, if not worse. The district court was therefore right to reject the appellant’s semi-innocent explanation as clearly defying belief.

19. Due to these circumstances, I rule that the appellant’s conviction of conspiracy to commit aggravated assault is well grounded in the evidence. *See* CrimA 4770/14 Agaev v. State of Israel ¶¶ 55–56 (Nov. 5, 2015) (discussing the basis of this crime); CrimA 2681/15 Ben Shitrit v. State of Israel ¶¶ 52–55 (Feb. 14, 2016) (same); CrimA 3338/99 Pakovitz v. State of Israel ¶ 24 (Dec. 20, 2000) (same). The appellant’s guilt of this crime has been proved beyond a reasonable doubt, and if my fellow justices accept my opinion, we will reject his appeal.

### **Should the Appellant be Convicted of Infliction of Grievous Bodily Harm?**

20. I believe we must answer this question in the negative for the reasons detailed below.

21. The State is correct that the district court erred: the location data of the cellular phones of the appellant and Ron Ayash place the appellant at the scene of the event while it occurred. *See* T/143 p. 8 § 3.4, p. 10 § 3.6. According to the district court’s finding of facts, the event began at approximately 8:25 PM and ended at 8:32 PM. *See* District Court ruling p. 33. The appellant’s

location data places him at the area (HaRabi MiBachrach Street) on 3/10/2015 at 8:15 PM. At 9:05 PM his location data places him at Kiryat Malachi, which does not negate the scenario in which he was one of the attackers at the Florentin 1 event. The district court incorrectly stated that the appellant's location data placed him at 8:54 PM at Ashdod Junction. *Id.* p. 44. In fact, this location data was gathered from Ron Ayash's cellular phone, not from the appellant's phone. Ron Ayash's location data places him at 8:54 PM at Ashdod Junction and at the scene of the event in Florentin at 8:36 PM, after the event had ended. Thus, the appellant had a window of opportunity to participate in the event and escape by car to Kiryat Malachi. The district court determined, based on its incorrect understanding of the location data, that it was reasonable that the appellant left the event early, and thus that there was a reasonable doubt regarding the appellant's participation in the event. However, the location data does not support the appellant's story at all, since Ron Ayash was located at Ashdod Junction at 8:54 PM and at the scene of the event (HaRabi MiBachRach Street) at 8:36 PM, showing that it was possible to participate in the event and leave the area within that time frame. Additionally, according to the appellant's own statement, he and Ron Ayash left the area together in the same car, driving south.

22. The State argues that correcting this error—which is undoubtedly necessary—leads to only one conclusion: that we must convict the appellant of infliction of grievous bodily harm. I cannot agree with this argument. Conspiracy to commit a crime combined with the opportunity to commit is insufficient to prove that the defendant committed the crime itself. In order to complete the missing link, there must be evidence showing that the defendant took part in commission of the crime—directly, by aiding and abetting it, or by inciting it. Without such evidence, the defendant could only be found guilty under the doctrine of joint and several criminal conspiracy liability, that is, that “once the criminal conspiracy is established, each of the conspirators becomes, for purposes

of the conspiracy, an agent of the others, so that every act they commit . . . during and in furtherance of the conspiracy is considered to be committed by them all, even in the absence of the other coconspirators and without their foreknowledge.” See CrimA 129/56 Goldstein v. Attorney General 10 PD 505, 516 (1956); CrimA 88/58 Kaiser v. Attorney General, 12 PD 1628 (1958); CrimA 8704/09 Basha v. State of Israel (Nov. 11, 2012), Hendel, J. Op. ¶ 24. However, Amendment 39 of the Penal Code repealed this doctrine, replacing it with the rule that “a conspirator bears criminal liability for crimes that are the goal of the conspiracy or were made in its furtherance, *only if he was part of their commission.*” Penal Code, 5737-1977, § 499(b) (emphasis added); see also Basha, Hendel, J. Op. ¶ 24; S.Z. Peler, *Ahrayut Plilit Lelo Ma’aseh, al Smach Ma?*, Ha-Praklit 29(19) (1974) (Heb.).

23. I examined the evidence in the district court’s record and did not find any evidence that the appellant participated in the assault. A La Familia member, Matan Shimon, indeed stated out of court that the appellant was one of the last people to leave the scene, but this statement does not attribute any specific criminal acts to the appellant. Moreover, Matan Shimon also stated that “there were two people from Kiryat Malachi *that I know weren’t involved*” (emphasis added). This apparently refers to the appellant and Ron Ayash, who came from Kiryat Malachi. Due to the contradiction between these two statements, the district court declined to establish any facts based on Matan Shimoni’s statements. Another La Familia member, Omer Golan, told the State’s witness that “if I’m not mistaken, Aviv was . . . Aviv Bezalel if I’m not mistaken.” This statement does not convey much, to say the least, and the district court therefore refrained from relying on it. Naor Shmuel, another La Familia member, nodded affirmatively when asked by the State’s witness whether the appellant and Ron Ayash were at the event. But this, too, does not indicate that he participated in the assault. Thus, there is no evidence, even indirect evidence, that the appellant

participated in the assault. No one testified to seeing him carrying a weapon or concealing his face. It is clear that the appellant was present at the event, but not every member of La Familia who was present participated in the assault that caused grievous bodily harm to the Hapoel fan Y.S. It is true that most of the members planned to attack Hapoel Tel Aviv fans, and we must assume that they acted, or attempted to act, in furtherance of this criminal goal. Only a small minority of La Familia members present declined to take part in the assault. But they must not be ignored: these members, who might include the appellant, should not bear criminal liability for the assault and resulting grievous bodily harm that they did not cause.

24. The evidence connecting the appellant to the assault is identical to the evidence in the Prisoners in the Yard hypothetical with which I began this opinion. The State has shown with a high degree of likelihood that the appellant participated in the Florentin 1 event. *The problem is that it has done so using naked statistical evidence, which is insufficient to convict a defendant.* Since not every La Familia member present at the event participated in the attack, each member present who was not identified as one of the attackers has a small likelihood of being innocent. The appellant is one such member. The likelihood of his innocence is low, even very low. However, even if we assume that it is as low as 0.01 (1%), with the likelihood of his participation in the assault being 0.99 (99%), we must acquit him due to a reasonable doubt.

25. The limitations of statistical evidence necessitate this result for two reasons. First, the evidentiary picture showing the high likelihood of the appellant's guilt fails the sensitivity test. The evidence in this case applies uniformly to all members of La Familia who attended the Florentin 1 event and were not identified as participants in the assault. This uniformity is not sensitive to the critical differences between the attendees who participated in the assault and those who did not. Without evidence tying the appellant personally to the assault, the evidence admitted

in this case is insufficient to convict him. See David Enoch & Talia Fisher, *Sense and “Sensitivity”*: *Epistemic and Instrumental Approaches to Statistical Evidence*, 67 STAN. L. REV. 557, 573–85 (2015).

26. The evidentiary picture before us also fails the normalcy test. This test requires that the court base the defendant’s conviction on evidence that, in the normal course of events, will not lead to the conviction of an innocent person (in contrast to extraordinary or unexpected events, which are marginal). See Martin Smith, *When Does Evidence Suffice for Conviction?*, 127 MIND 1193 (2018). In the instant case, if we find the appellant guilty of the assault and convict, along with him, all the La Familia members in his evidentiary situation, we will necessarily convict at least one innocent person. This decision is incorrect since it normalizes the conviction of innocent people by treating such convictions as standard and proper, whereas conviction of the innocent is meant to be an unintended, though unavoidable, “occupational hazard.”

27. It is illuminating to compare the evidentiary picture before us with the evidence that led to the appellant’s conviction of conspiracy to commit infliction of grievous bodily harm (“conspiracy evidence”). The conspiracy evidence is not statistical evidence and cannot be used to convict a La Familia member who was not connected to the conspiracy. Specifically, an unconnected La Familia member could not have arrived at the exact same time and place as the planners of the assault. The conspiracy evidence thus reveals sensitivity to the differences between the innocence of one suspect and the guilt of another. Therefore, it can prove beyond a reasonable doubt that the appellant was part of the criminal conspiracy of which he was convicted. The conspiracy evidence also withstands the normalcy test. From a logical standpoint, it does not eliminate fantastic possibilities such as an innocent La Familia member arriving, entirely randomly, at the Hapoel storage unit at 7:30 PM on 3/10/2015, at the same time as the conspirators. However, such an

extraordinary circumstance is outside the normal course of events, and therefore does not create a reasonable doubt regarding the appellant's participation in the conspiracy regarding Florentin 1. *See* CrimA 2418/17 Kotina v. State of Israel ¶ 18 (Oct. 25, 2018) (explaining why theoretical doubts do not count as reasonable).

28. Proving guilt with statistical evidence alone is also incompatible with the nature of criminal liability. Criminal liability is personal. *See* S.Z. FELLER, 1 YESODOT BE-DINEI ONSHIN 100 (1984) (Heb.). It rests on the fundamental assumption that human beings are autonomous agents and that the State's capacity to declare them criminals—stigmatizing them and taking their freedom—depends entirely on their own actions. The State must prove that the defendant himself violated the criminal law. The necessary evidence therefore must relate to the defendant and his actions. A defendant's membership in a group that most, but not all, of its members participated in illegal activities does not prove that he participated in these illegal acts and does not give the State authority to punish him. *See* Alex Stein, *The New Doctrinalism: Implications for Evidence Theory*, 163 U. PA. L. REV. 2085, 2090–93 (2015). According to § 34:22(a) of the Penal Code, which accurately reflects Israeli law from its founding to the present day, proof beyond a reasonable doubt requires evidence of individual illegal acts that were taken by the defendant. Without such evidence, the presumption of innocence is not refuted. *See* CrimA 543/79 Nagar v. State of Israel 35(1) PD 113 (1980); CrimA 9809/08 Lazdorovsky v. State of Israel (Nov. 25, 2010), Hendel, J. Op. ¶¶ 2–3. Purely statistical evidence is not evidence of individual illegal acts, since “for statistics, there are no individuals, and for individuals, no statistics.” *See* Alex Stein, *The Flawed Probabilistic Foundation of Law and Economics*, 105 NW. U. L. REV. 199, 213 (2011).

29. After reading the opinion of my fellow JUSTICE SOHLBERG, I repeatedly reviewed my analysis acquitting the appellant, and I remain convinced of my opinion. My fellow justice's

analysis of the evidence strengthens the conclusion that the appellant *likely* participated in the assault as an active participant, aider and abetter, or inciter. This likelihood, however, is not sufficient to convict him. As I explained above, evidence that shows a high likelihood of a defendant's guilt does not prove his guilt beyond a reasonable doubt, so long as the evidence fails to describe the defendant's own actions. Such likelihood is statistical evidence and no more, whereas the State must present evidence of individual acts in order to convict a defendant of a crime. This individualized evidence must be inductive and not quantitative, telling the court the concrete story of the defendant's alleged criminal act. The State did not meet this burden in its attempt to show that the appellant inflicted grievous bodily harm.

30. JUSTICE SOHLBERG and I agree that the State would have met its burden had it proved that *all* the members of La Familia at the scene participated in the assault. Unlike JUSTICE SOHLBERG, I am convinced that in the absence of such proof, we must assume that at least some of those members were passive spectators who did not participate in the assault. The existence of a nontrivial likelihood that some of the members did not participate in the assault required the State to prove beyond a reasonable doubt that the appellant, Aviv Bezalel, was not one of those passive spectators. Testimony and out-of-court statements stating that the appellant "was there" do not meet this requirement because they do not inform us about the appellant's actions during the assault. By contrast, they inform us about his participation in the conspiracy preceding the assault. The only evidence that comes close to the individualized evidence the State was required—but failed—to present was the out-of-court statement by Omer Golan, "Aviv Bezalel if I'm not mistaken," which was said to the State's witness in response to the question "Was there anyone with knives?" It seems to me that a hearsay statement made by a criminal with the caveat "if I'm not mistaken" requires us to find a reasonable doubt, since the criminal may be mistaken or

misleading. At most, this statement can serve as a basis for remanding the case to the district court in order to elicit testimony from Mr. Golan. This remand seems destined to fail, though, given the district court's assessment that "the statement, on its face, has low evidentiary value."

31. I am willing to agree with JUSTICE SOHLBERG that under the circumstances, the appellant had a tactical burden to show a reasonable doubt regarding his participation in the assault. However, a tactical burden is not a burden of adducing evidence and is certainly not a burden of persuasion, as explained by my fellow JUSTICE SOHLBERG in a different case:

A tactical burden . . . does not change the evidentiary burdens in a criminal proceeding. Ultimately, the burden remains on the prosecution throughout the proceeding to prove the guilt of the defendant beyond a reasonable doubt.

CrimA 6392/13 State of Israel v. Kariaff (Jan. 21, 2015), Sohlberg, J., Op. ¶ 124. The appellant therefore has the basic right to benefit from the doubt that is found in the evidentiary picture. This is doubt is unquestionably reasonable and calls for the appellant's acquittal.

32. JUSTICE SOHLBERG notes in his opinion that the appellant "attempted to distance himself from the crime, from La Familia, and even from his fandom of the soccer team" during his interrogation by the police and the court. The appellant indeed attempted to distance himself from the conspiracy of which he was convicted by the district court, and I too found him guilty of this crime without any difficulty. So far, so good. But how can one conclude from the appellant's actions—even if we think he lied shamelessly—that he took an active part in the assault? The rules of evidence by which we convict and acquit defendants state that a defendant's lies can only corroborate existing evidence. *See, e.g.*, CrimA 210/81 Aqbiub v. State of Israel 36(3) PD 393, 418 (1982). Where there is an absence of evidence, a defendant's lies cannot assist the State in proving his guilt. *See* CrimA 476/72 Tarnovsky v. State of Israel 27(1) PD 376, 380 (1973).

33. I agree with JUSTICE SOHLBERG that the case before us is factually distinct from the Prisoners in the Yard. In the instant case, all the members of La Familia who were present at the scene were members of a criminal conspiracy to commit an assault, whereas the single prisoner in the prison yard took no part in a comparable criminal conspiracy. However, this factual difference is legally irrelevant since our Legislator eliminated the doctrine of joint and several criminal conspiracy liability. I am not sure whether eliminating this doctrine was a good decision. From an economic standpoint, which prioritizes optimal deterrence over other societal values, the best decision would have been to retain the doctrine. *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1372–75 (2003). But the Legislator has made its decision, and we are obligated to execute it. The doctrine of joint and several criminal conspiracy liability has been erased from our criminal code, and therefore there is no substantive difference between the instant case and the Prisoners in the Yard. These cases are legally indistinguishable and we must rule on them similarly. JUSTICE SOHLBERG states in this context that the appellant “crossed the bounds of the conspiracy” by “continuing to walk with his friends to the location of the assault,” and maintains that the appellant “participated in the crime.” In my opinion, this assessment begs the question by assuming the joint liability of the conspirators and reviving this nullified doctrine. *See supra Ahrayut Plilit Lelo Ma’aseh* 19–21.

### **Conclusion**

34. The state has proved that the appellant was one of the conspirators of the subject event, but has failed to prove beyond a reasonable doubt that he took part in the violent acts that were planned by the conspirators or that he contributed in some other way to the furtherance of the goals of the conspiracy.

35. I therefore suggest to my fellow Justices that we deny both appeals and affirm the decision of the district court.

**Justice N. Sohlberg**

1. My fellow, JUSTICE STEIN, has thoroughly examined the issues. I agree with him that we should deny Aviv Bezael's appeal and affirm his conviction of felony conspiracy pursuant to Penal Code § 499(a)(1) (1977). As to the State's appeal, I disagree with my fellow justice. I believe we should grant the appeal and convict Bezael of infliction of grievous bodily harm pursuant to Penal Code § 329(a)(1).

2. The district court found that Bezael was a member of the conspiracy to assault HaPoel Tel Aviv fans, and that he arrived at the area "with other organization members, while taking into account the goals and operations of the organization." However, the district court was unsure as to whether Bezael left the area before the assault. The district court assessed the evidence before it, deciding which evidence was favorable to the prosecution and which was favorable to the defense.

The evidence favorable to the prosecution: (1) Bezael's arrival at the location of the assault together with other La Familia members; (2) Bezael's statement to the State's witness that he was present at the location of the event; (3) Omer Golan's statement: "If I'm not mistaken, Aviv was . . . Aviv Bezael if I'm not mistaken"; (4) Naor Shmuel's statement, nodding affirmatively when asked by the State's witness whether Bezael was at the event; (5) Matan Shimon's statement in the presence of the State's witness: "I left last. Me, Aviv Bezael were last and who else left with us? And, and, well the fat guy, I forget his name, our friend from Herzeliya Avi Cheetah. The three of us left last, bro, and Cheetah's head was split open . . . We left last, we drove last, me, him, and

what's that guy's name? We left last, Avi, something like Kravitz Avi [the State's witness: Aviv Kravitz Kravitz Aviv].”

The evidence supporting the defense: (1) Ofek Cohen's statement to the police, in which he (a) named those involved in the assault without naming Bezalel, and (b) stated, when shown Bezalel's photograph, that he knew Bezalel from the South, and not from participation in violent events; (2) Shimon's response to the State's witness's question, “Who came out of the event the most okay?”: “Everyone, bro, there was two from Kiryat Malachi who I know weren't involved in it”; (3) Cellular location data reports that support the district court's conclusion that Bezalel left the event before the assault began:

According to my findings of fact, the planning for the event and lying in wait for HaPoel Tel Aviv fans ended at 8:25 PM, and at 8:32 PM the organization members began to flee the location and the police were called. According to cellular location data, at 8:54 PM Bezalel was located at Ashdod Junction near Kiryat Malachi, and at 9:13 PM he was located in Kiryat Malachi. The distance from the Florentin neighborhood to the cell tower that registers Ashdod Junction, where Bezalel was located at 8:54 PM, is more consonant with him leaving early, at approximately 8:25 PM, than leaving late;

(4) Ron Ayash's testimony, which confirmed Bezalel's story that when they saw HaPoel Tel Aviv fans carrying sticks, they decided to leave the scene.

3. After surveying the evidence, the district court turned to Bezalel's testimony, finding it “far from impressive.” The court found that “his story, that he believed throughout his time at the scene that the only goal was to steal HaPoel Tel Aviv fans' gear was not believable, especially given that he denied observing [La Familia] members arm themselves and hand out pipes, a fact which was proved with a great deal of evidence.” D. Ct. Op. ¶ 53. Despite this, the district court found that there was insufficient evidence to eliminate the possibility that Bezalel left early and decided to acquit him.

4. As my fellow JUSTICE STEIN has shown, the district court made a factual error in its assessment of the cell location data, and correcting it sheds new light on Bezalel's location during the assault. The district court found that Bezalel's location at Ashdod Junction at 8:54 PM supports the defense's argument that he left the area at around 8:25 PM, before the assault began. The district court assumed that it was not possible to participate in the assault, in full or in part, leave the area, and arrive at Ashdod Junction by 8:54 PM. However, as my fellow has shown, this cellular location data relates to Ron Ayash, not Aviv Bezalel. Additionally, Ron Ayash, who was located at Ashdod Junction at 8:54 PM, was also located at or near the scene of the assault at 8:36 PM. This disproves the assumption that it was impossible to stay until the end of the event and reach Ashdod Junction by 8:54 PM. The cellular location data shows that Ayash was near the scene of the assault after it ended, and that he continued from there to Ashdod Junction. My fellow correctly found that, since Ayash and Bezalel drove in the same car, the evidence regarding Ayash's location also informs us of Bezalel's location. Regarding this, my fellow concluded: "It is clear that the appellant [Bezalel] was present at the violent event, or at least at part of it." I join this conclusion, both because of the way in which my fellow analyzed the cellular location data, and because of the statements, of Bezalel and others, that indicate that Bezalel was in the area during the assault. Although each statement, standing alone, has insufficient inculpatory capacity, when those statements are viewed together and combined with the cellular location data, they lead to the conclusion that Bezalel was at the vicinity of the event during the assault, in part or in its entirety.

5. Despite all this, my fellow JUSTICE STEIN believes that Bezalel's presence at the scene of the assault is not sufficient for convicting him of inflicting grievous bodily harm. According to him, in order to convict, "there must be evidence showing that the defendant took part in

commission of the crime—directly, by aiding and abetting it, or by inciting it.” Op. ¶ 22. According to my fellow, such evidence does not exist in the evidentiary record, since there is no evidence connecting Bezalel *personally* to the assault. I cannot join this conclusion. In my view, the evidentiary picture, combined with the rejection of the defendant’s story, leads to the conclusion that Bezalel participated in the assault. He therefore should be convicted of infliction of grievous bodily harm. It is true that none of the evidence points *directly* at Bezalel’s part in the assault itself or at specific acts he took. Rather, we can infer his involvement from the evidentiary picture in its totality and from circumstantial evidence that leads to the conclusion that Bezalel was *personally* involved in the assault on HaPoel Tel Aviv fans.

6. My fellow makes two assumptions in his opinion: First, that there is no evidence connecting Bezalel *personally* to the assault. Second, that convicting Bezalel based on his presence at the scene of the assault would rely on naked statistical probability, that is, on his membership in the majority group (as in the rule: when in doubt, “follow the majority,” *see, e.g.*, BT Ket. 15a). I reject these two assumptions for the reasons described below.

### **The Question Facing us is not about Statistics**

7. My fellow identifies a similarity between the issue before us—Bezalel’s conviction based on his presence at the assault—and the dilemma of the Prisoners in the Yard:

In a 1000-inmate prison, 999 inmates conduct a riot during which they kill all of the corrections officers, with the exception of two officers who escape by helicopter and film the riot from the aircraft. The film shows an unidentifiable inmate breaking away from the rioters: He stands against the wall with his hands raised, does not engage in any violent acts, and does not assist the other inmates in any way.

Op. ¶ 1. This hypothetical raises the dilemma of whether it is permissible to convict a prisoner who was randomly picked because of the high likelihood that he was a member of the violent majority. According to my fellow, the factual scenario in our case is similar. Most of the La Familia

members at the event participated in the assault, so we face the same question. Convicting a person who was at the event in the absence of personally incriminating evidence relies on the high likelihood of his membership in the majority violent group. According to my fellow JUSTICE STEIN, this must not be done, as a criminal conviction must not be based on a statistical likelihood. However, in my opinion, we need not resolve this difficult issue, since the case before us is different from the dilemma of the Prisoners in the Yard and does not involve the problem of naked statistics. In the dilemma of the Prisoners in the Yard, there is clear proof that one of the prisoners at the violent revolt did not participate in it. In our case, there is no comparable evidence. On the contrary, the evidentiary picture describes one group that acted as a unit; no one kept apart or distanced himself from the assault. Thus, for example, eyewitness Tali Malka stated: “We saw a group of over ten people, all wearing black with black hats, running after a small number of people. They had construction boards and small rocks . . . it looked like a planned attack. A large number of people chasing after a small number of people.” (T/21). Ron Michelin, another eyewitness, provided a similar description: “About twenty people came out of HaRabi MiBacharach I couldn’t recognize who came out with boards and bottles and they started to throw the bottles from the street corner.” (T/22). These two descriptions, provided by independent eyewitnesses, provide no support for the thesis that one or more La Familia members steered away from the criminal acts. There is certainly no support for the thesis that anyone objected to, blocked, or separated from the group. [...]

8. My fellow, however, finds that “not every member of La Familia who was present participated in the assault” and that “[o]nly a small minority of La Familia members present declined to take part in the assault.” Op. ¶ 23. I have not found support for these findings in the evidence. Specifically, there is no support for the finding that some of the group members did not

take active part in the assault. It is true that when the State's witness asked the participant Matan Shimon, "Who came out the most okay?", Shimon responded: "Everyone, bro, there was two from Kiryat Malachi who I know weren't involved." However, when the State's witnesses pressed for details about this statement, Shimon replied: "No, listen, you don't see who it is . . . listen bro, I don't look back, for that reason I only look ahead so I'm not ahead." This shows that Shimon's statement that "there was two who weren't involved" is not reliable. Shimon said explicitly that his statement was based on the fact that he did not observe the two, rather than on his observation of them not participating. Moreover, Shimon did not explain what he meant when he said they "weren't involved": Did he mean that they left before the assault? That they separated themselves from the other participants? Or perhaps that they merely failed to hit others with the same ferocity as their fellows?

Shimon's statement is quite vague, and does not support my fellow's statement that "[t]he evidence connecting the appellant to the assault is identical to the evidence in the Prisoners in the Yard hypothetical." Op. ¶ 24. As described above, the full evidentiary picture points toward the opposite conclusion. The eyewitnesses statements presented to the district court describe a single group acting as one unit and possessing one goal: to assault fans of HaPoel Tel Aviv. Since these are the facts, the instant case does not raise a question of conviction based on statistical probability. We are not dealing with the question of whether we should associate Bezalel with the majority or minority group, since the evidence shows that there was one homogenous group.

### **Evidence Tying Bezalel Personally to the Assault**

9. In addition to the fact that we are not dealing with a statistical question, there is indirect evidence connecting Bezalel *personally* to the assault. As detailed in the opinion, Bezalel's arrival at the area was not random or accidental. He arrived due to his membership in La Familia, as a

member of the inner circle of the organization—the “Kometz.” From the moment of his arrival at the scene, he became a member of the conspiracy to commit a felony, the assault of HaPoel fans. As my fellow has shown, Bezalel remained in the area during the assault. Additional evidence, even though it is comparatively weak, points to his personal involvement in the assault. Thus, in a conversation between Omer Golan and the State’s witness, the two discussed the possibility that the knives brought to the area were held by Bezalel. Omer Golan described the weapons brought to the area to the State’s witness, stating: “There was like everything there. Knives, everything.” Following this, the State’s witness asked, “Someone was with knives?” and Golan replied, “Aviv Bezalel if I’m not mistaken.” T/116. In a separate statement, Matan Shimon described Bezalel as “kravitz” due to his militancy (“kraviut” in Hebrew –trans.), noting that Bezalel was one of the last to leave the scene. *See* Testimony of the State’s witness on 2/14/2017, Protocol 109–10. The strength of each one of these pieces of evidence is low, but together they add up, complete each other, and create an evidentiary picture that leads to the clear conclusion that Bezalel arrived at the area with members of La Familia, conspired with them to carry out the assault, was present at the assault, and participated in it. In another case, I wrote: “It is worth remembering that there is no need to show that each piece of circumstantial evidence is independently sufficient to convict a defendant. The conclusion of guilt can be a result of a combination of multiple pieces of circumstantial evidence, with each piece alone merely raising a suspicion regarding the defendant’s guilt. Each piece of evidence may have an innocent explanation. However, where there is a greater variety of evidence, with the different pieces of evidence completing different parts of the picture, they come together like a puzzle to show a greater, though perhaps incomplete, picture that allows us to reach a conclusion of guilt beyond a reasonable doubt based on the common sense

conclusion that the combination of these pieces of evidence cannot be purely coincidental.” CrimA 6392/13 State of Israel v. Kariaff ¶ 98 (1/21/2015).

10. The conviction in the instant case does not rely on “insubstantial statistical evidence,” as my fellow attests, but on a collection of circumstantial evidence tying Bezalel *personally* to the assault. Among this evidence is: his membership in La Familia, the conspiracy he joined with respect to the assault, his presence at the event, statements that he left last, the nickname “kravitz” that shows his militant nature, the evidence showing that the group acted as one, the possibility that he brought knives to the event, and more.

11. My fellow is correct that the doctrine of joint and several criminal conspiracy liability has been repealed, and that a conspiracy finding alone cannot support a conviction of the underlying crime of the conspiracy. The Penal Code states: “The conspirator is criminally liable for the crime for which the conspiracy was formed or for a crime taken to further that goal only if he takes part in the commission of the crime pursuant to § 5(b).” § 499(b). Notably, there is no language rejecting the use of a conspiracy finding as circumstantial evidence tending to show the defendant’s motive and connections to the underlying crime. According to the doctrine of joint and several criminal conspiracy liability, the criminal goal of the conspiracy was attributed to all the conspirators, “even if it was carried out in their absence and without their prior knowledge.” CrimA 129/54 Goldstein v. the Attorney General 10 PD 505, 516 (1956). In the instant case, the crime was not carried out in the appellant’s absence. Soon after the conspiracy was formed, Bezalel walked with his fellows to the site of the assault. By doing so, he crossed the bounds of the conspiracy and took part in its commission. Therefore, I am not proposing a conviction based on the doctrine of joint and several criminal conspiracy liability, but rather based on the connection

between Bezalel and the other assailants. His conviction is supported by his own actions, by his part in the conspiracy, and by his involvement in the crime itself.

12. In addition to the above acts, we should account for Bezalel's behavior during his police interrogation and in court. His actions show repeated attempts to distance himself from the crime, from La Familia, and even from his fandom of the soccer team. During his police interrogation, Bezalel refused to answer most of the questions posed to him, and when he did respond, it was later revealed that his responses were lies. Thus, when asked on 7/26/2016 about his role in La Familia, he responded that he was not a member of La Familia, and in fact was no longer a soccer fan. But in his response to the indictment he changed his position, confirmed his membership in La Familia, and stressed that "he is not a member in the sense of violent acts," and that "he is not a part of the 'Kometz' of La Familia." During his testimony in court, he recanted this position as well, confirming his membership in the "Kometz." Protocol 4/24/2019, 667 lines 14–16. Bezalel's story about his membership in La Familia evolved over time. First, he completely denied his membership in La Familia and his fandom of Beitar. He slowly began to recant this story, and first provided his full story in response to the indictment. The district court found that Bezalel's testimony was unreliable. Bezalel dodged questions about other involved parties, *see, e.g., id.* 680 lines 28–31, about the way in which they were armed and dressed, *id.* 683 line 26, 718 lines 7–26. Similarly, he was unable to explain what he discussed with the other involved parties over the phone soon before his arrival at the scene, *id.* 696 lines 1, 25. Bezalel's uncooperativeness, silence, evolving story, and failure to answer questions about the event are all suspicious and raise questions about his reliability and participation in the event. These circumstances, though they cannot alone justify a criminal conviction, join the evidentiary picture and support a finding of guilt. *See, e.g.,* CrimA 6928/17 State of Israel v. Asraf (Aug. 16, 2018), Amit., J., ¶ 51.

We see that the evidence discussed above, and Bezalel's actions at his police interrogation and in court, connect him *personally* to the attack on HaPoel Tel Aviv fans. This is not “purely statistical” evidence, which relies only on categories of people and does not relate to any individual specifically. ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 43 (2005). In my opinion, the evidence presented is sufficient to convict Bezalel of infliction of grievous bodily harm.

### **Claims in Favor of the Defendant**

13. Moreover, the possibility raised by my fellow JUSTICE STEIN that Bezalel was at the event but did not participate in the violent acts of the group was not raised by Bezalel himself at any point: not during the police interrogation, the district court proceeding, or the appeal. As mentioned above, Bezalel first presented his story in his response to his indictment. Bezalel stated that he arrived at the area in order to meet friends, without knowing who was planning to arrive. Upon arriving at the scene, he met with his friends in order to plan the theft of equipment from the storage unit of HaPoel Tel Aviv fans. But before the plan to assault was revealed, he abandoned the scene with his friend Ayash and drove back to Kiryat Malachi. This story was not provided soon after the event, under pressure of interrogators, or under the stress of the interrogation room. The story was presented to the court, after Bezalel's attorney had the opportunity to examine the entire case file and develop a story with a mind to the evidence. Bezalel chose the aforementioned story and stuck to it (with some minor variations) throughout his trial and appeal. Under these circumstances, I doubt we can attribute a different version of events to him—a version that he did not suggest and which does not align with the evidence in the file.

14. Maimonides stated in the MISHNEH TORAH that the court should generally not raise arguments for the parties that the parties did not themselves raise:

How do we know that the court should not speak for the parties? Because it says in the Torah, ‘distance yourself from lies.’ Rather, the court should state its views and

be silent. It should not raise claims for either of the parties; even if one party brings only one witness [although two witnesses are required under the law], the court should not tell the other party that the law requires two witnesses [so that the party may raise that defense].

MISHNEH TORAH, San. 21:10. There is one exception:

If the court sees an exonerating claim for one of the parties, and the party wishes to say it but cannot find the words; or if the court sees a party attempting to save himself by stating a true claim, but because of his anger the words escape him; or if he cannot speak due to his ignorance—the court may aid him a little, and help him begin his argument, due to the verse ‘Speak out for the mute.’ This matter should be deeply considered, so that the court does not become a lawyer.

*Id.* 21:11. The RaShbA (Rabbi Shlomo ben Avraham ibn Aderet, Barcelona 1235–1310) held similarly:

In any case there are times when even the court may raise claims for a party, due to the verse ‘Speak out for the mute.’ For example, when the court recognizes that a party is prevented from speaking solely due to his ignorance. *Each court decides on a case-by-case basis whether raising claims is appropriate.* As it says elsewhere, [a court may suggest the following defense to a party:] ‘maybe you had the contract and lost it.’ . . . For this reason they say that the court may raise claims for [disadvantaged parties such as] heirs and for borrowers, et cetera.

Responsa of the RaShbA Part II § 393. Thus, in situations in which the court recognizes that a party is struggling to defend himself due to his ignorance, the court may aid him by raising claims in his favor, due to the rule “speak out for the mute.” Prov. 31:8. But the instant case is not one of these outliers in which the court may raise claims for the parties. Bezalel is not “mute,” as he has been represented throughout all steps of the proceedings. As mentioned above, he raised his claims and provided his version of events after considering his moves, calculating his odds, and concluding that under the given circumstances, he should present a specific factual story. This is not a situation in which a defendant struggled to present his claims, was inadequately represented, or failed to provide any story at all. We are dealing with a defendant who, after assessing the evidence, chose a specific path. Under these circumstances, it is doubtful whether we may step into his shoes and improve, update, and correct his story.

15. Moreover, even assuming that it was proper to suggest the story proposed by my fellow JUSTICE STEIN, due to the rule “we raise claims for him,” BT BB 29b, this story has no basis in the evidence. On the contrary, the evidentiary picture shows clearly that Bezalel participated in the assault along with the other assailants. Bezalel was a member of the Kometz, arrived with his fellow organization members to the meeting place, planned the assault with them, and walked with them to the scene of the event. He remained at the scene, and according to one of the people involved, he was one of the last to leave. Considering both this and Bezalel’s behavior during the police interrogation and in court, we should conclude that Bezalel participated in the assault itself. My fellow’s suggested version of events does not align with the evidence in the record and does not match Bezalel’s own version of events. While Bezalel states that he left the scene before the assault began, my fellow rules that Bezalel was present at the scene but did not actively participate in the assault. This is not merely an exculpatory explanation, but rather an alternative factual story that conflicts with the defendant’s own story. My fellow’s ruling conflicts with the accepted rules for examining circumstantial evidence. *CrimA 9372/03 Weisel v. State of Israel*, 59 PD 1 745, 754 (2004).

### **Bezalel’s Presence at the Scene of the Assault**

16. As I near the end of my opinion, I wish to address another matter—the implications of the defendant’s presence at the scene of the assault. According to my fellow JUSTICE STEIN, proving Bezalel’s presence at the scene is insufficient to convict him. To convict him, there must be proof showing his contribution to the assault itself. Since there is no such evidence, my fellow holds that we must acquit him. Op. ¶ 23. In my view, this approach is inconsistent with established precedent about the implications of a defendant’s presence at the scene of a crime carried out jointly.

The crime attributed to Bezalel is by its nature carried out jointly. In order to prove the facts of such crimes “it is not necessary for each joint actor to prove all of its factual elements.” CrimA 2796/95 Does v. State of Israel 51 PD 3 388, 402 (1997). In a crime carried out jointly, the court views the actors as one body with many arms, where “the actions of each arm is attributed to the entire body and all of its components.” *Id.* Due to this approach, it is possible to convict joint actors, even when “the precise act carried out by each actor is unclear.” CrimA 5706/11 Ron v. State of Israel (Dec. 11, 2014), Shoham, J., ¶ 186. Thus, according to this rule, in some cases mere presence of a defendant is sufficient to convict him of participation in a crime. CrimA 2247/10 Yemini v. State of Israel ¶ 26 (Jan. 12, 2011). The meaning of presence at the scene, for the purpose of proving participation in the commission of the crime, was explained by Justice Mazza:

A person’s presence at the scene of a crime is itself a neutral fact. When the State argues that a person who was at the scene of a crime but did not participate in it was an accomplice of the criminal, the state has the burden to prove that his presence was intended to aid the criminal in one of the ways described above. . . . When the presence is ostensibly accidental, the State is unlikely to carry its burden without ‘proof showing actual aiding and abetting or possession of shared goals . . .’ But if the presence at the scene, due to the circumstances surrounding it, is not accidental, the presence itself can serve as proof that it was intended to aid the criminal in one of the known ways. In the instant case, the defendant has the burden of disproving the assumption, which arises from the circumstances and from common sense, that his presence at the scene of the crime derived from his participation in the crime. Once this assumption is created, the defendant is ‘permitted to show proof, or provide explanations, that show that the reasonable assumption is in fact unreasonable, or that the assumption, due to its factual sources, does not eliminate the possibility of a reasonable doubt.’ If the defendant fails to do so, and the evidence is sufficiently weighty to leave no room for reasonable doubt, the assumption may turn into decisive evidence that the court may rely upon to support a criminal conviction.

CrimA 319/88 Elmaliach v. State of Israel 43 PD 1 693, 698 (1989).

17. In summary, presence at the scene of a crime is a neutral fact unless it is shown that the presence is not accidental. When it is shown that the presence was not merely accidental, the tactical burden of proof shifts to the defendant and he must furnish an innocent explanation for his

presence at the scene. In the instant case, it is clear the Bezalel's presence at the scene was not accidental. Bezalel arrived due to his membership in the Kometz, and he remained at the scene after planning the assault with his friends. Under these circumstances, the rule states that the tactical burden shifts to Bezalel. The burden was shifted and was not carried. The assumption of the appellant's guilt therefore becomes evidence of it. Thus, even if there were no evidence connecting Bezalel personally to the assault, it would be proper to convict him as a co-perpetrator. According to my fellow, even though Bezalel's presence at the scene was not accidental, the tactical burden should not shift to him. Op. ¶ 30. I, on the other hand, have found no reason to diverge from established precedent. A person's presence at the scene of a crime requires him to provide a reasonable explanation for that presence when it is established that he was not a mere passerby. Shifting the tactical burden of proof to any such person is appropriate.

For these reasons, were my opinion followed, we would grant the State's appeal and convict Bezalel of the crime of infliction of grievous bodily harm, pursuant to Penal Code § 329(a)(1).

**Justice G. Karra**

1. I agree with the decision of my fellows JUSTICE SOHLBERG and JUSTICE STEIN to deny the appellant's appeal of his conviction of conspiracy felony. Penal Code § 499(a)(1) (1977). As to the State's appeal of Bezalel's acquittal of infliction of grievous bodily harm, Penal Code § 329(a)(1), I join my fellow JUSTICE STEIN's decision to deny the appeal. In my opinion, the State's evidence is insufficient to support Bezalel's conviction as a joint perpetrator of the crime of grievous bodily harm. Even the evidence detailed by my fellow JUSTICE SOHLBERG is insufficient to support this conviction. The only direct evidence of Bezalel's involvement in the assault, as detailed my fellow JUSTICE SOHLBERG, is as follows:

- a. Omer Golan's hearsay statement, T/116, that was admitted pursuant to § 10A of the Evidence Ordinance. All that can be gleaned from this statement is the affirmation: "Aviv Bezalel [was with the knife] if I'm not mistaken." Even if we accept this out-of-court statement at face value, all we can learn from it is that Bezalel carried a knife. The statement says nothing about Bezalel's involvement in the assault itself.
- b. Matan Shimon's statement calling Bezalel "kravitz" due to his militancy (kravi) and noting that Bezalel was one of the last to leave the event. This statement, too, says nothing about Bezalel's direct involvement in the violent event.

2. In paragraph 7 of his opinion, JUSTICE SOHLBERG states that the evidentiary picture describes "one group that acted as one unit." He bases this assessment on Tali Malka's testimony, T/21: "We saw a group of people, over ten people, all dressed . . . . A large number of people chasing after a small number." He also refers to the testimony of Ron Michelin, T/22, which, in his opinion, provides a similar description: "Twenty people approximately came out . . . ." However, these statements do not provide similar descriptions of the event. One statement mentions *ten* people and a large number, and the other mentions *twenty* people. Violent events are dynamic and it is not uncommon to see variations in descriptions of the number of people involved and each person's actions. From the descriptions excerpted above we can learn that many people were present—ten or twenty people—so it is not inconceivable that there were some who came with the intent to join the assault but who, in reality, took no part in it.

3. In any event, the evidence presented fails to paint a clear picture of Bezalel's part in the event. It is true that "joint perpetrators are one body acting with many arms, [and] it is not necessary for each arm to perpetrate a criminal act." CrimA 1294/96 Meshulam v. State of Israel 52 PD 5 1

(1998), Barak, J., ¶ 5. To convict Bezalel, though, the State must prove that he has committed an act that by its nature is part of the inner circle of the commission of the crime. Thus, if there were evidence identifying Bezalel as one of the ten or twenty people chasing after the smaller group and stating that he carried a stick, a knife, or a stone with the purpose of attacking the victims, Bezalel could be convicted of infliction of grievous bodily harm, since he was in the inner circle of the commission of the crime. “Commission, for these purposes, has a broader meaning than the carrying out of the *actus reus* of the crime.” CrimA 2652/95 Raz v. State of Israel ¶ 5(c) (Feb. 21, 1996). Because there is no such evidence, Bezalel cannot be held liable as a co-perpetrator: it is possible that he did not carry out any acts in the inner circle of the commission of the crime.

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The case is decided according to the opinion of JUSTICE STEIN, with JUSTICE SOHLBERG dissenting.  
Delivered October 27, 2019.